Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

No. 91-1097

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALDEN WARD, PETITIONER

v.

ANDREW CARD, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Transportation's decision to deny petitioner a waiver of the federal safety requirement that truckers must have no medical history of epilepsy is consistent with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 943 F.2d 157.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1991. The petition for a writ of certiorari was filed on December 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATEMENT

1. Since 1935, Congress has authorized federal regulation of commercial motor vehicle safety. See Motor Carrier Vehicle Safety Act of 1935, ch. 498, § 204(a), 49 Stat. 546. The present statute authorizes the Secretary of Transportation to issue regulations establishing "minimum Federal safety standards" to "ensure that * * * the physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely." 49 U.S.C. App. 2505(a)(3). The statute also authorizes the Secretary to waive any regulation "with respect to any person or class of persons" if waiver is not contrary to the public interest and is "consistent with the safe operation of commercial motor vehicles." 49 U.S.C. App. 2505(f).

The Secretary's Motor Carrier Safety Regulations have long provided that a person with a history of epilepsy is not qualified to drive a commercial motor vehicle. 4 Fed. Reg. 2294, 2295-2296 (1939) (§§ 1.21(b), 1.31). The current regulations, which are the product of 1970 revisions, state that a person is physically qualified to drive a commercial motor vehicle only if he has "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle." 49 C.F.R. 391.41(b)(8).

In 1988, DOT's Office of Motor Carriers sponsored a task force to make recommendations with respect to appropriate changes of the Motor Carrier Safety Regulations. The task force's response included recommendations concerning the epilepsy regulation. The task force recognized that when a seizure-free epileptic takes anticonvulsant medicine, the risk that he will have an accident because of his condition is

extremely low. Nevertheless, the task force concluded that individuals who rely on anticonvulsant medication to control seizures "should not be authorized to drive commercial interstate vehicles." Pet. App. 35a. The task force explained that the stress imposed on truck drivers who have irregular hours and eating habits may increase the risk of a seizure while driving, and that the benefits of anticonvulsant medication will not be realized if the individual forgets to take it. *Id.* at 33a-34a. Accordingly, "[i]t is impossible to predict which of these individuals may have seizures should they inadvertently miss a dosage of medication." *Id.* at 35a. The task force indicated that further study was needed and that the issue should be "reassessed in the future when more data is collected." *Ibid.*

2. Petitioner has a history of epileptic seizures. To control the condition, petitioner takes anticonvulsant medication; he has not had a seizure since 1984. Until May 1989, he worked as a truck driver. At that time, petitioner's employer discovered his condition, and, in accordance with Department of Transportation (DOT) regulations, suspended him. Pet. App. 4a-5a.

Petitioner filed an application with DOT seeking a waiver of the epilepsy regulation. He attached certain medical records and a statement from his doctor saying he should be allowed to drive. Pet. App. 6a. He also included a statement from an expert in epilepsy, who had served on DOT's task force, reflecting his belief that "the exclusion of individuals who are taking antiepileptic or anticonvulsant medications for commercial driving is wrong." *Ibid.*

DOT denied the request for a wavier. Initially, DOT noted that petitioner had not submitted

sufficient information to justify an individual waiver.[1] DOT also noted that it was in the process of revising its epilepsy rules in light of the task force recommendations and it invited petitioner to participate in the rulemaking proceedings. Pet. App. 42a-43a. Petitioner, however, renewed his request for an individual waiver and supplied additional information. After considering the information, DOT denied petitioner's request. The agency cited the current regulation that deems persons with a medical history of epilepsy to be medically unqualified to drive a commercial motor vehicle. The agency also noted the task force's recommendation against allowing persons who take seizure-control medication to drive commercial vehicles. *Id.* at 43a-45a.

3. Petitioner sought review in the court of appeals. He contended that DOT, in denying him a waiver of its rule against allowing persons with a history of epilepsy to drive commercial vehicles, failed to make an individualized inquiry into his capacity to drive, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[2]

The court of appeals rejected that contention. Relying on *Traynor* v. *Turnage*, 485 U.S. 535 (1988), the court stated that "an agency, in treating

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[1] DOT indicated that to make a determination on petitioner's request, it would require "complete copies of [petitioner's] medical records related to the diagnosis and treatment of his epilepsy, and a copy of his complete driving record from the State licensing agency which granted [petitioner] a license to drive." Pet. App. 43a.

[2] Section 504(a) states, in pertinent part, that "[n]o otherwise qualified individual with handicaps * * * shall, solely by reason of her or his handicap, * * * be denied the benefits of, or be subjected to discrimination * * * under any program or activity conducted by any Executive agency." 29 U.S.C. 794(a).

handicapped persons, may sometimes proceed by way of general rule or principle, at least where 1) the agency behaves reasonably in doing so, 2) a more individualized inquiry would impose significant additional burdens upon the agency, and 3) Congress, as well as the agency, has expressed some kind of approval of the general rules or principles involved." Pet. App. 24a. The court found *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), to be consistent with that approach; the Court in that case had interpreted the Rehabilitation Act to require "individualized inquiry" in "most" but not all cases, Pet. App. 25a (quoting *Arline*, 480 U.S. at 287), and that case had involved the standards governing a district court's interpretation of the Rehabilitation Act, not agency regulations "addressed specifically to the handicapped problem." Pet. App. 25a.

Examining DOT's decision under those standards, the court concluded that the agency's denial of a waiver to petitioner did not violate the Rehabilitation Act. First, the court noted that DOT had not simply relied on its blanket "anti-epilepsy" rule, but had individualized its consideration of petitioner by looking to the standards that were proposed in the 1988 task force report. Those standards, the court continued, would permit a person with epilepsy to operate a commercial vehicle if the person has not had a seizure for ten years and does not use medication to control the risk of a seizure. Petitioner, however, did not satisfy those standards, Pet. App. 31a, and, in that situation, "the Task Force recommended against an exception." *Id.* at 20a.

Next, the court found it reasonable for DOT to rely on the task force conclusion. The court observed that the task force had explained in some detail the risks involved in allowing persons who take anticonvulsant medication to drive commercial vehicles, and had

called for further general investigation. Pet. App. 34a-35a. In light of the task force's recommendation for more studies, the court found that additional consideration by DOT of petitioner's individual circumstances would likely not provide an adequate basis for the agency to determine whether he can safely operate trucks. *Id.* at 35a-36a. The court noted that the agency intended to conduct a rulemaking on the issue and that it would consider petitioner's materials in connection with that effort. *Id.* at 36a-37a.

The court also identified significant burdens that would result if DOT were required to go beyond the guidance found in the task force report. The court noted that "[t]he parties seem to disagree, not about any individual facts concerning petitioner's health, but about whether the Task Force's recommendation to disqualify those who, like petitioner, take anticonvulsant medicine, is a sound recommendation—a matter more fit for a rule-making, than for a rule-waiver, proceeding." Pet. App. 27a. Finally, the court concluded that, "as in *Traynor*, Congress has enacted legislation that suggests some degree of awareness of, involvement in, or approval of the relevant regulation." *Ibid.* In light of those factors, the court of appeals upheld DOT's denial of a waiver.

ARGUMENT

1. Petitioner contends (Pet. 15-31) that DOT's refusal to grant him a waiver of its rule against permitting persons with a history of epilepsy to drive commercial vehicles was inconsistent with the Rehabilitation Act of 1973. According to petitioner, DOT erred by relying on a categorical finding that persons with epilepsy who take anticonvulsant medication should not be permitted to drive commercial vehicles; instead, petitioner would require DOT to

consider each case on its individual facts. The court of appeals correctly held that the Rehabilitation Act does not require such individualized consideration in this context.

In *Traynor* v. *Turnage*, 485 U.S. 535 (1988), this Court rejected the contention that a regulation issued by the Veterans Administration that made a categorical determination about the effect of alcoholism on eligibility for an extension of time to apply for certain veterans' benefits violated the Rehabilitation Act. Although stating that the Rehabilitation Act prohibits "generalized determinations that lack any substantial basis," *id.* at 550, the Court concluded in that case that the regulation at issue was approved by subsequent legislation and was "neither expressly nor implicitly repealed" by the later enacted Rehabilitation Act. 485 U.S. at 551. The Court distinguished *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), by noting that "*Arline* did not involve a handicapping condition as which Congress had specifically determined that no individualized inquiry was necessary." 485 U.S. at 551 n.11.

As in *Traynor*, this case involves a regulatory determination that Congress has approved. The statute requiring DOT to promulgate safety regulations allows DOT to rely on categorical regulations in determining who may operate commercial motor vehicles. In the Motor Carrier Safety Act of 1984—enacted *after* the Rehabilitation Act was extended to federal agencies (Pet. App. 28a)—Congress required that "the Secretary shall issue regulations pertaining to commercial motor vehicle safety [that] * * * shall, at a minimum, ensure that * * * the physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely." 49 U.S.C. App. 2505(a)(3). Congress further provided that if such regulations were not issued,

previously issued safety regulations would remain in effect. 49 U.S.C. App. 2505(e).

Congress is presumed to be aware that the Secretary's pre-existing regulations made many categorical judgments with respect to medical issues and driver safety, including judgments with respect to epilepsy.[3] See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). The statutory "repromulgat[ion]" of DOT's safety regulations, including the epilepsy regulation, establishes that DOT may permissibly make categorical determinations about the relationship between commercial motor vehicle safety and the physical condition of drivers. Pet. App. 28a. Indeed, in this case DOT did not rely simply on the categorical determination in its regulations, but looked to the recommendations of a task force report that would allow some persons with epilepsy to drive commercial vehicles. Petitioner, however, had experienced a seizure within ten years and was taking anticonvulsant medication; he therefore did not qualify under the task force recommendations.

Petitioner contends (Pet. 19, 21) that the court of appeals applied the wrong standard of review to DOT's reliance on the task force report. He argues that *Traynor* requires "substantial medical evidence" of a "serious health or safety threat," Pet. 19, 21, quoting *Traynor*, 485 U.S. at 550-551 n.11, while the court of appeals found only that the task force

[3] The epilepsy rule, as in effect in 1984, appeared at 35 Fed. Reg. 6458, 6463 (1970); see 49 C.F.R. 391.41(b)(8). Other regulations in effect at the time (and still in effect) covered such conditions as diabetes, heart disease, poor eyesight, poor hearing, and alcoholism. 49 C.F.R. 391.41(b)(3), (4), (10), (11), and (13); 35 Fed. Reg. 6458, 6463 (1970).

determination on which the agency relied was no more than a "reasonable" assessment of possible risks. As the court of appeals explained, however, DOT had a substantial basis for finding that the irregular life of an interstate trucker increases the risk that a person controlling epilepsy with medication might be subject to an unforeseen seizure. Pet. App. 33a-35a. The DOT task force had specifically concluded that individuals who rely on anticonvulsant medication to control seizures "should not be authorized to drive commercial interstate vehicles." *Id.* at 35a. Although the question may be a "close" one, *id.* at 33a, the Rehabilitation Act does not require the court of appeals to draw its own medical conclusions rather than accepting reasonable findings of an agency based on thorough, and recent, consideration of the issue.

It is the responsibility of DOT to make judgments concerning the effect of a medical condition on the ability to perform a transportation job, such as driving a commercial truck.[4] If the Rehabilitation Act were read to require these programs to be administered solely on the basis of an "individualized inquiry," it would engender daunting administrative costs. Such a requirement would "saddle the Government with additional administrative and financial burdens that Congress could not have contemplated in extending § 504 to federal programs." *Traynor*, 485 U.S. at 551 n.12.

2. Petitioner errs in contending (Pet. 15-16, 31-33) that the court of appeals' decision conflicts with decisions of other courts. The issue in this case is

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[4] DOT's responsibilities are not limited to commercial drivers, but extend to a variety of transportation programs. For example, DOT requires commercial pilots to meet certain medical standards. 14 C.F.R. 61.151(e), 61.123(c), 67.13, 67.15.

distinguishable from cases involving state regulatory programs. See Pet. 15-16, citing *Strathie* v. *Department of Transportation*, 716 F.2d 227 (3d Cir. 1983) (state regulations on qualifications of school bus drivers); *Jackson* v. *State*, 544 A.2d 291 (Me. 1988) (same). In reconciling the DOT's action in this case with the requirements of the Rehabilitation Act, the court of appeals properly took into account the fact that a federal statute specifically vests the Secretary of Transportation with responsibility to develop general safety rules as a matter of federal law.

The Secretary's regulatory mandate also distinguishes this case from those cited by petitioner in which the government is charged with discrimination against handicapped individuals. See *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1987) (denial of employment as postal clerk based on epilepsy); *Doe* v. *Attorney General*, 941 F.2d 780, 793 (9th Cir. 1991) (FBI's action in telling employees that a particular physician performing examinations was suspected of having AIDs was deemed "proprietary," not "administrative or regulatory"); cf. *Kelly* v. *Bechtel Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986) (employment discrimination suit under state law against private employer). Those cases, unlike this one, did not involve a statute that authorizes the agency to make generally applicable regulatory judgments regarding medical conditions and safety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992